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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

ORIGINAL

In the Matter of )

WKZF-FM, Inc. )

FCC File No. BRH-950814UC

MM Docket No. 96-110

For Renewal of License )  
for Station WKZF(FM) )  
Bayboro, North Carolina )

To: The Honorable John M. Frysiak, Administrative Law Judge

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**REPLY TO MASS MEDIA BUREAU'S OPPOSITION TO**  
**MOTION FOR SUMMARY DECISION AND**  
**COUNTERMOTION FOR SUMMARY DECISION**

Pursuant to Section 1.251 of the Commission's rules,<sup>1</sup> WKZF-FM, Inc. ("WKZF-FM"), licensee of Station WKZF(FM), Bayboro, North Carolina ("WKZF" or the "Station"), through its attorneys, hereby submits this Reply to Mass Media Bureau's Opposition to Motion for Summary Decision and Countermotion for Summary Decision ("Opposition and Countermotion") in the above-referenced proceeding regarding the renewal of the license for the Station. In support thereof, the following is shown:

**A. Mass Media Bureau's Opposition and Countermotion**

The Mass Media Bureau's (the "Bureau's") response to WKZF-FM's Motion for Summary Decision ("Motion") does not provide any logical or legal basis on which the Commission should rest a dismissal of WKZF-FM's Motion. In its Opposition and Countermotion, the Bureau spends four and a half out of six substantive pages merely restating

<sup>1</sup> 47 C.F.R. § 1.251.

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what WKZF-FM had argued in its own Motion. Thereafter, in a single paragraph, the Bureau argues that WKZF-FM's Motion cannot be granted as a matter of law because there is no way that the licensee can show that its efforts with regard to returning the Station to the air have been diligent in light of the fact that a modification application for the Station was only recently filed with the Bureau and the licensee failed to seek continued authority for the Station to remain silent.<sup>2</sup> The Bureau argues that, absent such a showing, the Commission can have no basis on which to find that it would be in the public interest to grant the renewal application in the instant proceeding.

The Bureau further contends that "the only justification that WKZF[-FM] provides for the grant of its renewal application is that it has now filed a modification application."<sup>3</sup> It claims that mere evidence of this filing is not a sufficient showing of diligent efforts to allow WKZF-FM to "meet its burdens with respect to the issues designated" in the *Hearing Designation Order* for this proceeding.<sup>4</sup>

The Bureau goes on to aver, in a seven line countermotion, that "the appropriate legal inferences require that the Bureau's countermotion be granted."<sup>5</sup> However, the Bureau fails to further state what these "appropriate legal inferences" are and exactly how they should justify the Commission's grant of the Bureau's countermotion. The countermotion consists of essentially one argument, which relies on circular reasoning. The Bureau states that "it is clear that WKZF[-

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<sup>2</sup> Opposition and Countermotion at 5.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

FM] cannot return the station to the air," specifically because the Bureau itself will not consider the very modification application that would allow the licensee to return the station to the air while the renewal application is designated for hearing, and thus, the Station's renewal application should be denied.

**B. The Bureau's Opposition and Countermotion Provide No Reasonable Basis for a Dismissal of WKZF-FM's Motion for Summary Decision or a Denial of the Station's Renewal Application.**

While the Bureau correctly recognizes that WKZF-FM cannot return the Station to the air without a grant of its pending modification application, it neglects to acknowledge that it is the Bureau's own decision to delay any consideration of the application until after the renewal application is granted that is essentially causing the Station to remain off the air at this point. Through the detailed facts set forth in its Motion, WKZF-FM has shown that it has acted diligently and in good faith to return the Station to the air since it acquired the license in the spring of 1995. When it acquired the license, the former tower site was inoperable and not in the condition to be repaired and the Station had been dark for some time. WKZF-FM has since arranged for operation of the Station from a new site and has obtained the technical and financial support necessary to return the Station to the air within 60-90 days. Yet it cannot do so without legal authorization from Commission that will enable it to move forward in this process.

In a recent Summary Decision of Administrative Law Judge Arthur I. Steinberg,<sup>6</sup> attached as Exhibit 1, Judge Steinberg found that the licensee of Station WPVG, Funkstown, Maryland, whose circumstances with regard to its renewal application were similar to that of the

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<sup>6</sup> *WPVG, Inc.*, MM Docket No. 96-117, FCC 96D-05 (released September 5, 1996).

instant case, had sufficiently demonstrated its diligent efforts to return the station to the air when it located a new tower site from which to broadcast and prosecuted a modification application to acquire authorization to implement that change. Judge Steinberg also found that the failure of the licensee to formally request continued authority to remain silent was not disqualifying, in light of the fact that it had noted in the cover letter to its modification application that the station was silent and would remain off the air until after the Commission issued the construction permit necessary to resume broadcast operation. Likewise, in the instant case, WKZF-FM has pursued similar diligent actions to relocate the inoperable former tower site and prosecute a modification application for authorization to broadcast from that site. WKZF-FM filed its application for modification promptly upon completion of the engineering studies required to finalize the application. Moreover, WKZF-FM notified the Commission in an exhibit to its renewal application that the Station was off the air and would remain so until grant of its modification application. Thus, WKZF-FM's renewal application should be granted at this time.

If the Presiding Officer is concerned that WKZF-FM will not in fact return the Station to the air upon grant of the renewal, it is important to recognize that WKZF-FM has no better impetus to promptly return the Station to the air than the February 8, 1996 statutory deadline imposed by the Telecommunications Act of 1996. Even if both the renewal application and the pending modification application are granted in the near future, should WKZF-FM not return the Station to the air by February 8, 1996, which is *less than six months from now*, the Station's license will automatically expire at that time and the licensee and its creditors will be left with nothing but a number of legal, technical and other costs to show for its efforts to return the Station to the air. Given that deadline and possible outcome, there is no logical reason why the

licensee would want anything other than to return the Station to the air as soon as possible. If the applications are granted, the Commission can rest assured that WKZF-FM has every intention to return the Station to the air by February 8, 1996, if not earlier. The alternative result is not appealing.<sup>7</sup>

The Bureau itself notes in its Opposition and Counter-motion that "the critical issue in this proceeding is whether...grant of the renewal application serves the public interest."<sup>8</sup> The public interest of the Bayboro, North Carolina community is surely not best served by a denial of the renewal application. Such denial would no doubt assure that the Bayboro community would lose much-needed local radio broadcast service for years to come, if not permanently. The alternative, to grant the renewal application, will allow the licensee the opportunity to return the Station to the air and effectively serve the Bayboro public. Thus, WKZF-FM urges the Presiding Officer to grant the renewal application in the interest of the public and the community of Bayboro.

(continued on next page)

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<sup>7</sup> In *WPVG, Inc.*, Judge Steinberg conditioned the grant of the renewal on the resumption of broadcast operations on or before February 8, 1997. WKZF-FM encourages the Presiding Officer in this case to do the same.

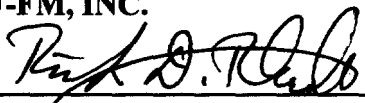
<sup>8</sup> *Id.*

C. **Conclusion**


For the reasons set forth above, WKZF-FM respectfully requests that the Presiding Officer issue deny the Bureau's Countermotion, grant WKZF-FM's Motion for Summary Decision, renew the license for the Station, and instruct the Bureau to promptly consider WKZF-FM's pending modification application on an expedited basis.

Respectfully submitted,

WKZF-FM, INC.

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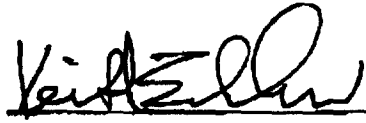
September 13, 1996

**DECLARATION OF KEITH ECKHARDT**

I, Keith Eckhardt, President of WKZF-FM, Inc., licensee of Station WKZF(FM), Bayboro, North Carolina, do hereby state, under pain or penalty of perjury, that I have read the foregoing "Reply to Mass Media Bureau's Opposition to Motion for Summary Decision and Countermotion for Summary Decision" and that the facts contained therein are true and correct to the best of my knowledge, information and belief.

**WKZF-FM, INC.**

By:

  
\_\_\_\_\_  
Keith Eckhardt  
V President, operations

Date:

9/13/96

**EXHIBIT 1**



Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

|                        |   |                      |
|------------------------|---|----------------------|
| In the Matter of       | ) | MM DOCKET NO. 96-117 |
|                        | ) |                      |
| WPVG, INC.             | ) | File No. BR-950601VH |
|                        | ) |                      |
| For Renewal of License | ) |                      |
| for Station WPVG(AM)   | ) |                      |
| Funkstown, Maryland    | ) |                      |

Appearances

Roy F. Perkins, Jr., Esquire, on behalf of WPVG, Inc.; and Alan E. Aronowitz, Esquire, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF  
ADMINISTRATIVE LAW JUDGE ARTHUR I. STEINBERG

Issued: September 3, 1996

Released: September 5, 1996

Preliminary Statement

1. By *Hearing Designation Order*, DA 96-814, adopted May 16, 1996, and released May 22, 1996 ("HDO"), the Assistant Chief, Audio Services Division, Mass Media Bureau, by delegated authority, designated for hearing the application of WPVG, Inc. ("WPVG" or "Licensee"), for renewal of license for Station WPVG(AM), Funkstown, Maryland. The following issues were specified:

- (1) To determine whether WPVG, Inc. has the capability and intent to expeditiously resume the broadcast operations of WPVG(AM), consistent with the Commission's Rules.
- (2) To determine whether WPVG, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.
- (3) To determine, in light of the evidence adduced pursuant to the preceding issues, whether grant of the subject renewal of license application would serve the public interest, convenience and necessity.

The HDO further provided that, in the event it is determined that a grant of the renewal application would serve the public interest, convenience and necessity, the grant will be conditioned on the expeditious resumption of operation. HDO at para. 4. The HDO placed upon the Licensee both the burden of proceeding with the introduction of evidence and the

burden of proof. *Id.* at para. 7. A prehearing conference was held on July 9, 1996. (Tr. 4-16.)

2. Presently under consideration are a Motion for Summary Decision, filed on August 15, 1996, by WPVG, and comments in support thereof, filed on August 26, 1996, by the Mass Media Bureau.

### Findings of Fact

3. The *HDO* recited the following facts as the basis for the specification of the issues in this proceeding:

WPVG suspended operations on October 30, 1994 when the owner of the station's transmitting antenna site ordered the [L]icensee to remove its facilities from the property. WPVG reported that it was in the process of establishing a new tower site, and that it would file the appropriate application when zoning approval was received for the new location. In its June 1, 1995 renewal application WPVG reported that its search for a new site was complicated by the necessity to secure a site that would serve both WPVG's needs while protecting AM Stations WMET (Gaithersburg, Maryland) and WCCS (Homer, Pennsylvania) from interference. On September 12, 1995, WPVG reported that it was negotiating for two possible sites, that it hoped to finalize an agreement for one of these sites by September 24, 1995, and that it expected to file the proper application (FCC Form 301) for this site when the site owner accepted its offer. The special temporary authority approving WPVG's September, 1995 request [to remain silent] expired March 27, 1996. A review of the record for this station does not indicate that an application to relocate the station's transmitting antenna has been filed. Further, the [L]icensee has neither notified the Commission that broadcast operations have resumed nor requested further extension of its special temporary authority. Therefore, WPVG is in apparent violation of Sections 73.1740 and 73.1750 of the Commission's Rules.

*HDO* at para. 2 (footnotes omitted).

4. In its Motion for Summary Decision, the Licensee does not dispute that portion of the *HDO* which summarizes the facts pertaining to the loss of its transmitter site. (Motion at 3.) Rather, WPVG challenges the accuracy of the *HDO*'s statement that no application to relocate the station's transmitter had been filed. In support, WPVG relies on the following additional facts.

5. On April 18, 1996, the Licensee filed an application (under FCC Form 301) for a construction permit for a new transmitter site. The cover letter to that application stated, *inter alia*, that "Station WPVG is presently off the air and will be until the station is built after the CP is granted." (Motion at 3 and Att. A.) Public notice of the receipt and acceptance of the

application for the new site was issued by the Commission on May 13, 1996. (*Public Notice*, "Broadcast Applications," Report No. 23736, dated May 13, 1996, at 6.)

6. On May 30, 1996, eight days after the release of the *HDO* in this proceeding, the Licensee's counsel, by letter, requested the Commission to extend for six months the authority for WPVG to remain silent. The letter stated as grounds for the extension request that WPVG was silent due to the loss of its leased antenna-transmitter site, and that the Licensee was forced by the lessor to remove its equipment, including the tower. The letter noted that a new site had been located, that an application to construct the WPVG transmitting facilities at the new site had been filed with the Commission, and that the application had been accepted for filing. (Letter from Roy F. Perkins, Jr., to William F. Caton, Acting Secretary of the Commission, dated May 30, 1996.)

7. On June 6, 1996, the Licensee's counsel, by letter to the Mass Media Bureau's Audio Services Division, requested that action be expedited on WPVG's pending application for a construction permit for a new transmitter site. The letter was filed pursuant to *Public Notice*, "Procedures Announced for Expedited Processing of Applications Filed by Silent Broadcast Stations," DA 96-818, released May 22, 1996. Counsel's letter noted that the station was silent due to the eviction from its former site, and that a grant of the application for a new site was necessary for WPVG to resume broadcast operations. (Letter from Roy F. Perkins, Jr., to James Crutchfield, Audio Services Division, dated June 6, 1996.)

8. By letter dated June 27, 1996, from an engineer in the Audio Services Division, the Licensee was advised of technical deficiencies in its application for a new transmitter site. The letter afforded the Licensee 30 days within which to file a curative amendment. (Motion at 4 and Att. B.) The Licensee's curative amendment was filed with the Commission on July 24, 1996. (*Id.* at 4.)

9. By fax message dated July 30, 1996, from an engineer in the Audio Services Division, the Licensee was advised as follows:

Ready to grant WPVG app[lication] as soon as FAA approval received.  
Fax FAA approval to me as soon as you receive it.

Warning: Failure to resume broadcast operations by Feb[ruary] 9, 1997, or the 12 month silent period ending thereafter will result in the loss of the licensed WPVG facilities. Lack of FAA approval will not delay loss of licensed facility due to Telecom Act of 1996.

(Motion at 4 and Att. C.)

### Conclusions of Law

10. The Motion for Summary Decision will be granted and the issues will be resolved in WPVG's favor. Pursuant to Section 1.251 of the Commission's Rules, in order to warrant summary decision a party must show that there is no genuine issue of material fact remaining for determination at the hearing. In order to sustain such a motion, it must be established that the truth is clear, that the basic facts are undisputed, and that the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts. *Big Country Radio, Inc.*, 50 FCC 2d 967 (Rev. Bd. 1975). WPVG has met this stringent test.

11. With respect to Issue 1, WPVG has established that the factual basis for the specification of this issue was in error. Thus, the Licensee has shown that the relevant portion of the *HDO* was premised upon the erroneous assumption that no application to relocate the station's transmitting antenna had been filed prior to the issuance of the *HDO*. However, as shown by WPVG, an application for a new transmitter site had been filed on April 18, 1996, and was accepted for filing by *Public Notice* dated May 13, 1996. Both of those events took place prior to the adoption and release of the *HDO*. By filing its application for a new transmitter site, and by diligently prosecuting and seeking the expedited processing of that application, WPVG has demonstrated that it is earnestly seeking to restore the station to the air as promptly as possible. Indeed, it appears that the Audio Services Division is ready and willing to grant WPVG's modification application as soon as FAA approval is obtained. Consequently, WPVG has satisfied its burden of showing that it has the capability and intent expeditiously to resume the broadcast operations of its station, and Issue 1 is resolved in its favor.

12. Turning to Issue 2, it must be concluded that, although the Licensee did not violate Section 73.1750 of the Commission's Rules, it was in violation of Section 73.1740(a)(4) of the Rules for a brief period of time. Such violation, however, does not reflect adversely upon the basic qualifications of WPVG to remain a Commission licensee.

13. Section 73.1750 of the Commission's Rules provides:

The licensee of each station shall notify the FCC in Washington, DC of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, DC for cancellation.

The Licensee did not violate this section of the rules. WPVG clearly had the intention to restore the station to operation. This is demonstrated by the fact that it located a new site for its transmitter, prepared and filed the requisite application for that site, and has diligently prosecuted its application since that time. Further, there is no evidence that WPVG intended to discontinue permanently the operation of its station.

14. Section 73.1740(a)(4) of the Commission's Rules provides, in pertinent part:

In the event that causes beyond the control of a licensee make it impossible . . . to continue operating, the station may . . . discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of . . . discontinued operation. . . . In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

The Licensee was in violation of this provision of the rules for approximately two months. Thus, WPVG's special temporary authority to remain silent expired on March 27, 1996, but no written request for an extension of that authority was made until May 30, 1996. However, this violation is partially mitigated by the fact that the Licensee did notify the Commission within 30 days of the expiration of the special temporary authority that the station remained silent. Specifically, in its April 18, 1996, cover letter accompanying WPVG's modification application, the Licensee stated that the station was off the air, and would remain off the air until the station was built after the Commission issued a construction permit. As noted above, this rule violation does not impact adversely upon the Licensee's basic qualifications. *Cf. Video Marketing Network, Inc.*, 10 FCC Rcd 7611, 7613 (MMB 1995); *Cavan Communications*, 10 FCC Rcd 2873 (ALJ 1995). Therefore, Issue 2 is resolved in the Licensee's favor.

#### Ultimate Conclusion

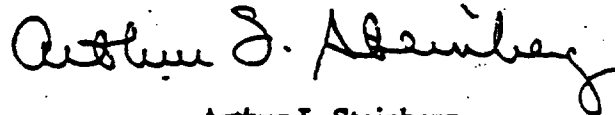
15. In sum, it has been concluded that the Licensee has the capability and intent expeditiously to resume the broadcast operations of WPVG(AM) consistent with the Commission's Rules, that the Licensee did not violate Section 73.1750 of the Commission's Rules, and that the Licensee did violate Section 73.1740(a)(4) of the Rules for a brief period of time. It has been further concluded that the Licensee's rule violation is not disqualifying. It is, therefore, ultimately concluded that the public interest, convenience and necessity would be served by a grant of the Licensee's renewal application. *Cf. Video Marketing Network, Inc.*, *supra*; *Keyboard Broadcasting Communication*, 10 FCC Rcd 4489 (MMB 1995); *Cavan Communications*, *supra*. However, the grant will be conditioned on the resumption of broadcast operations on or before February 8, 1997. *HDO* at para. 4; 47 U.S.C. § 312(g).

Accordingly, IT IS ORDERED that the Motion for Summary Decision filed by WPVG, Inc., on August 15, 1996, IS GRANTED and Issues 1, 2 and 3 ARE RESOLVED in the Licensee's favor.

IT IS FURTHER ORDERED that, unless an appeal from this Summary Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Sections

1.251(e) and 1.276 of the Rules, the above-captioned application of WPVG, Inc., for renewal of license for Station WPVG(AM), Funkstown, Maryland, IS GRANTED subject to the condition that the station SHALL RESUME broadcast operations on or before February 8, 1997.<sup>1</sup>

## FEDERAL COMMUNICATIONS COMMISSION



Arthur I. Steinberg  
Administrative Law Judge

<sup>1</sup> In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release pursuant to Sections 1.251(e) and 1.276(d) of the Rules.